



DEPARTMENT OF TRANSPORTATION

National Highway Traffic Safety Administration

[Docket No. NHTSA-2018-0028; Notice 2]

Mobility Ventures, LLC, Denial of Petition for Decision of Inconsequential Noncompliance

AGENCY: National Highway Traffic Safety Administration (NHTSA), Department of Transportation (DOT).

ACTION: Denial of petition.

SUMMARY: Mobility Ventures, LLC (Mobility), a wholly owned subsidiary of AM General, LLC, has determined that certain model year (MY) 2015-2016 Mobility Ventures MV-1 motor vehicles do not fully comply with Federal Motor Vehicle Safety Standard (FMVSS) No. 126, *Electronic Stability Control Systems for Light Vehicles*. Mobility filed a noncompliance Part 573 Safety Recall Report on February 14, 2018. Mobility subsequently petitioned NHTSA on February 20, 2018, for a decision that the subject noncompliance is inconsequential as it relates to motor vehicle safety. This notice announces the denial of Mobility's petition.

FOR FURTHER INFORMATION CONTACT: Vince Williams, Office of Vehicle Safety Compliance, the National Highway Traffic Safety Administration (NHTSA), telephone (202) 366-2319.

SUPPLEMENTARY INFORMATION:

I. Overview:

Mobility has determined that certain MY 2015-2016 Mobility MV-1 motor vehicles do not fully comply with the requirements of paragraph S5.3.3¹ of FMVSS No. 126, *Electronic Stability Control Systems for Light Vehicles* (49 CFR 571.126). Mobility filed a noncompliance Part 573 Safety Recall Report on February 14, 2018, pursuant to 49 CFR part 573, *Defect and*

¹ NHTSA believes that Mobility inadvertently cited paragraph S4.3.3 of FMVSS No. 126 in its petition. NHTSA believes, based on Mobility's Part 573 Safety Recall Report, that Mobility meant to cite paragraph S5.3.3 of FMVSS No. 126 in its petition.

Noncompliance Responsibility and Reports. Mobility subsequently petitioned NHTSA on February 20, 2018, pursuant to 49 U.S.C. 30118(d) and 30120(h) and 49 CFR part 556, for an exemption from the notification and remedy requirements of 49 U.S.C. Chapter 301 on the basis that this noncompliance is inconsequential as it relates to motor vehicle safety.

Notice of receipt of Mobility's petition was published with a 30-day public comment period, on September 17, 2019, in the Federal Register (84 FR 48990). No comments were received. To view the petition and all supporting documents log onto the Federal Docket Management System (FDMS) website at <https://www.regulations.gov/>. Then follow the online search instructions to locate docket number "NHTSA-2018-0028."

II. Vehicles Involved:

Approximately 977 MY 2015-2016 Mobility Ventures MV-1 vehicles, manufactured between December 22, 2014, and August 24, 2015, are potentially involved.

III. Noncompliance:

Mobility reports that the previous model year vehicles (2011-2014) were equipped with a 4.6L V8 powertrain with 6 ignition states and the engine was changed in model years (2015-2016) to a 3.7L V6 powertrain with 11 ignition states. Following the change, the supplier of the Electronic Brake Control Module (EBCM) incorrectly programmed the EBCM memory chip to recognize the possible power mode states. This issue led to the telltale warning lamp not illuminating to indicate an Electronic Stability Control (ESC) fault under certain starting conditions, thus, not complying with paragraph S5.3.3 of FMVSS No. 126.

IV. Rule Requirements:

Paragraph S5.3.3 of FMVSS No. 126, includes the requirements relevant to this petition. As of September 1, 2011, except as provided in paragraphs S5.3.4, S5.3.5, S5.3.8, and S5.3.10, the ESC malfunction telltale must illuminate when a malfunction of the ESC system exists and must remain continuously illuminated under the conditions specified in paragraph S5.3 for as long as the malfunction exists (unless the "ESC malfunction" and "ESC Off" telltale are

combined in a two-part telltale and the “ESC Off” telltale is illuminated), whenever the ignition locking system is in the “On” (“Run”) position.

V. Summary of Mobility’s Petition:

The following views and arguments presented in this section, “V. Summary of Mobility’s Petition,” are the views and arguments provided by Mobility. Mobility describes the subject noncompliance and contends that the noncompliance is inconsequential as it relates to motor vehicle safety.

Mobility states its belief that the subject noncompliance is inconsequential “because the Traction Control Off warning lamp will illuminate when a fault is detected, either immediately if the operator pauses with the key in the ‘ignition on’ state before starting the vehicle, or upon driving if the vehicle is started without pausing in the ‘ignition on’ state.” Despite the noncompliance, Mobility claims that the driver would still be “alerted to the possibility of a malfunction with the ESC system by the illumination of the Traction Control Off warning lamp.” Although Mobility believes the subject noncompliance to be inconsequential to motor vehicle safety, it and its EBCM supplier, BWI Group, are “developing a plug-and play re-flashing tool that will permit uploading of revised software into the current EBCM installed in the vehicle.” Mobility explains that the software “tracks the ignition sequences required by FMVSS No. 126, and fully corrects the observed noncompliance.” However, Mobility says its only available solution at present would be “to remove and replace the entire electrical and hydraulic unit with one that has had its software updated.”

Mobility states that it “has notified its dealers to stop sale of any affected MV-1 vehicles that may be in their dealer inventory (new, used or demonstrator) until the EBCM software is updated.” In addition, Mobility says that its “authorized dealers will perform EBCM unit replacement or re-flashing (when available) free-of-charge when vehicle owners present to Dealers for service.”

Mobility says “is not aware of any issues” related to the subject noncompliance, nor has it “received any warranty claims, field reports, or information about injuries or crashes related to the performance of the ESC.”

Mobility concludes by expressing its belief that the subject noncompliance is inconsequential as it relates to motor vehicle safety, and that its petition to be exempted from providing notification of the noncompliance, as required by 49 U.S.C. 30118, and a remedy for the noncompliance, as required by 49 U.S.C. 30120, should be granted.

Mobility’s complete petition and all supporting documents are available by logging onto the Federal Docket Management System (FDMS) website at: <https://www.regulations.gov> and by following the online search instructions to locate the docket number listed in the heading of this notice.

VI. Supplemental Information:

Mobility’s petition contained sparse details about the condition(s) of when the “Traction Control Off” lamp would set in lieu of the ESC malfunction lamp or whether the required ESC lamp would eventually set at some point during the drive cycle. The petition also did not mention if the issue affected “ALL” ESC related faults or if it was specific to the faults attributed to steering angle sensor failures.

NHTSA requested more detailed information from Mobility about the subject noncompliance. In Mobility’s supplemental response, it confirmed that under the subject noncompliance, the appropriate ESC diagnostic trouble code is triggered internally in the system; however, due to the failure in the software programming, the system incorrectly illuminates the “Traction Control Off” malfunction lamp instead of the required “ESC” malfunction lamp. Mobility added that the “Traction Control Off” lamp also illuminates when an operator manually “turns off” the Traction Control System (TCS) via the push-button toggle switch and that the TCS will remain “Off” and the lamp illuminated until either the TCS is re-enabled via an

ignition-cycle or, the operator pushes the toggle switch a second time. Mobility also confirmed that the TCS remains fully functional and effective in this scenario.

NHTSA also requested clarification from Mobility with respect to how much time lapses after the vehicle starts moving until the system sets the ESC fault code and at what speed this occurs. Mobility responded to NHTSA that it should take approximately 8 minutes of driving a vehicle before the ESC fault code sets. However, Mobility failed to provide any insight with respect to what speed it believes a vehicle would need to be traveling for the system to set the ESC fault code.

VII. NHTSA's Analysis:

The burden of establishing the inconsequentiality of a failure to comply with a *performance requirement* in an FMVSS—as opposed to a *labeling requirement with no performance implications*—is more substantial and difficult to meet. Accordingly, the Agency has not found many such noncompliances inconsequential.²

In determining inconsequentiality of a noncompliance, NHTSA focuses on the safety risk to individuals who experience the type of event against which a recall would otherwise protect.³ In general, NHTSA does not consider the absence of complaints or injuries when determining if a noncompliance is inconsequential to safety. The absence of complaints does not mean vehicle occupants have not experienced a safety issue, nor does it mean that there will not be safety issues in the future.⁴

² Cf. *Gen. Motors Corporation; Ruling on Petition for Determination of Inconsequential Noncompliance*, 69 FR 19897, 19899 (Apr. 14, 2004) (citing prior cases where noncompliance was expected to be imperceptible, or nearly so, to vehicle occupants or approaching drivers).

³ See *Gen. Motors, LLC; Grant of Petition for Decision of Inconsequential Noncompliance*, 78 FR 35355 (June 12, 2013) (finding noncompliance had no effect on occupant safety because it had no effect on the proper operation of the occupant classification system and the correct deployment of an air bag); *Osram Sylvania Prods. Inc.; Grant of Petition for Decision of Inconsequential Noncompliance*, 78 FR 46000 (July 30, 2013) (finding occupant using noncompliant light source would not be exposed to significantly greater risk than occupant using similar compliant light source).

⁴ See *Morgan 3 Wheeler Limited; Denial of Petition for Decision of Inconsequential Noncompliance*, 81 FR 21663, 21666 (Apr. 12, 2016); see also *United States v. Gen. Motors Corp.*, 565 F.2d 754, 759 (D.C. Cir. 1977) (finding defect poses an unreasonable risk when it “results in hazards as potentially dangerous as sudden engine fire, and where there is no dispute that at least some such hazards, in this case fires, can definitely be expected to occur in the future”).

Arguments that only a small number of vehicles or items of motor vehicle equipment are affected also do not justify granting an inconsequentiality petition.⁵ Similarly, mere assertions that only a small percentage of vehicles or items of equipment are likely to actually exhibit a noncompliance are unpersuasive. The percentage of potential occupants that could be adversely affected by a noncompliance is not relevant to whether the noncompliance poses an inconsequential risk to safety. Rather, NHTSA focuses on the consequence to an occupant who is exposed to the consequence of that noncompliance.⁶ The Safety Act is preventive, and manufacturers cannot and should not wait for deaths or injuries to occur in their vehicles before they carry out a recall.⁷ Indeed, the very purpose of a recall is to protect individuals from risk. *Id.*

NHTSA evaluated the merits of the petition submitted by Mobility and has determined that its petition has not met the burden of persuasion that the subject FMVSS No. 126 noncompliance is inconsequential to motor vehicle safety. Specifically, S5.3.3 of FMVSS No. 126 requires that the ESC malfunction telltale must illuminate when a malfunction of the ESC system exists and must remain continuously illuminated under the conditions specified in paragraph S5.3 for as long as the malfunction exists (unless the “ESC malfunction” and “ESC Off” telltale are combined in a two-part telltale and the “ESC Off” telltale is illuminated), or whenever the ignition locking system is in the “On” (“Run”) position.

In making this determination, NHTSA considered Mobility’s argument that the condition which causes this noncompliance is inconsequential to motor vehicle safety because when it occurs, it would alert the vehicle operator of the possibility of an ESC malfunction due to it

⁵ See *Mercedes-Benz, U.S.A., L.L.C.; Denial of Application for Decision of Inconsequential Noncompliance*, 66 FR 38342 (July 23, 2001) (rejecting argument that noncompliance was inconsequential because of the small number of vehicles affected); *Aston Martin Lagonda Ltd.; Denial of Petition for Decision of Inconsequential Noncompliance*, 81 FR 41370 (June 24, 2016) (noting that situations involving individuals trapped in motor vehicles—while infrequent—are consequential to safety); *Morgan 3 Wheeler Ltd.; Denial of Petition for Decision of Inconsequential Noncompliance*, 81 FR 21663, 21664 (Apr. 12, 2016) (rejecting argument that petition should be granted because the vehicle was produced in very low numbers and likely to be operated on a limited basis).

⁶ See *Gen. Motors Corp.; Ruling on Petition for Determination of Inconsequential Noncompliance*, 69 FR 19897, 19900 (Apr. 14, 2004); *Cosco Inc.; Denial of Application for Decision of Inconsequential Noncompliance*, 64 FR 29408, 29409 (June 1, 1999).

⁷ See, e.g., *United States v. Gen. Motors Corp.*, 565 F.2d 754, 759 (D.C. Cir. 1977).

immediately illuminating the “Traction Control Off” warning lamp when the fault occurs as opposed to the ESC malfunction lamp and then later illuminating the ESC malfunction lamp after the vehicle is driven for some period of time. While reviewing this petition, NHTSA requested clarification from Mobility about some of the details in the petition and attempted to learn how the issue would manifest itself to the operator in a real-life scenario. Mobility responded to NHTSA’s request and provided supplemental information about how the fault code would set and the conditions in which it would illuminate the malfunctions lamps. Despite the additional information provided, Mobility has not met its burden of proof that this noncompliance is inconsequential to vehicle safety. The ESC system, with its corresponding ESC malfunction lamp, is a required safety system with the purpose of reducing the number of deaths and injuries that result from crashes in which the driver loses directional control of the vehicle, including those resulting in vehicle rollovers. It would not be in the best interest of the public to allow a vehicle to operate with an ESC malfunction at any point without illuminating the required ESC malfunction lamp. An illuminated Traction Control Off lamp does not carry the same sense of urgency as the ESC malfunction lamp. Whenever an ESC failure is detected, it is imperative that the ESC malfunction lamp illuminates as to alert the driver that the ESC system is not active and that the system should be serviced immediately.

VIII. NHTSA’s Decision:

In consideration of the foregoing, NHTSA finds that Mobility has not met its burden of persuasion that the subject FMVSS No. 126 noncompliance is inconsequential to motor vehicle safety. Accordingly, Mobility’s petition is hereby denied. Mobility is consequently obligated to provide notification of and free remedy for that noncompliance under 49 U.S.C. 30118 and 30120.

(Authority: 49 U.S.C. 30118, 30120; delegations of authority at 49 CFR 1.95 and 501.8)

Anne L. Collins,

Associate Administrator for Enforcement.

